133

(1)

Supreme Court, U.S.
FILED

No. 09-57

MAY 14 2009

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 2008

PETER PAUL MITRANO,
Petitioner,

versus

VIRGINIA L. KELLY,
Respondent.

On Petition for a Writ of Certiorari to the
Court of Special Appeals of Maryland

PETITION FOR WRIT OF CERTIORARI

Peter Paul Mitrano
Pro se
4912 Oakcrest Drive
Fairfax, Virginia 22030

Petitioner

May 14, 2009

Questions Presented for Review

1. Was the court in the State of Maryland required to enforce a custody order from the Commonwealth of Virginia entered pursuant to 28 U.S.C. § 1738A (also know as the Parental Kidnapping Prevention Act (PKPA))?

2. Is a New Hampshire Order custody order that was issued in violation of 28 U.S.C. § 1738A void as a matter of law?

3. *Arguendo*, did the court in the State of Maryland err in not ruling on Mitrano's petition to modify custody and/or any alleged support order from the State of New Hampshire?

4. Were the constitutional rights of Mitrano violated?

5. Does Mitrano have a right to start a revolution?

Parties to the Proceeding

The caption of this case in this Supreme Court of the United States contains the names of all parties before the courts below. No party is a parent, subsidiary or affiliate of any company.

Table of Contents

Questions Presented i

Parties to Proceedings ii

Table of Authorities iv

Opinions Below 1

Jurisdiction 2

Constitutional Provisions and Statutes Involved 2

Statement of the Case 2

Reasons for Granting the Petition 4

Conclusion 36

IN THE

Supreme Court of the United States

October Term, 2008

PETER PAUL MITRANO,

Petitioner,

v.

VIRGINIA L. KELLY,

Respondent.

Peter Paul Mitrano, *pro se*, respectfully petitions for a writ of certiorari to review the judgments of the Court of Special Appeals of the State of Maryland in this case.

Opinion Below

The Order of the Court of Appeals of the State of Maryland (in Petition Docket No. 544) denying a writ of certiorari to the Court of Special Appeals of the State of Maryland is dated February 13, 2009. See *Mitrano* v. *Kelly*, 407 Md. 277, 964 A.2d 676, (Table) certiorari denied (2008). A judgment of the Court of Special Appeals of the State of Maryland (No. 531) from which petitioner seeks certiorari is dated November 21, 2008. Another judgment of the Court of Special Appeals of the State of Maryland (No. 2804) from which petitioner seeks certiorari is dated August 20, 2007. See *Mitrano* v. *Kelly*, 402 Md. 354, 936 A.2d 851, (Table) certiorari denied (2007). All lower court decisions are officially unreported.

Jurisdiction

The Order of the Court of Appeals of the State of Maryland denying a writ of certiorari to the Court of Special Appeals of the State of Maryland was entered on February 13, 2009. For purposes of this matter, said Order is final. This petition for writ of certiorari was filed within ninety days of said date of February 13, 2009. This Court's jurisdiction is invoked under 28 U.S.C., § 1257(a).

Constitutional Provisions and Statutes

Article VI, the Fifth and Fourteenth Amendments and Title 28 U.S.C., § 1738A.

Statement of the Case

This case arises from an action filed by petitioner Peter Paul Mitrano (hereinafter sometimes referred to as "Mitrano" and/or "father") against respondent, Virginia L. Kelly (hereinafter sometimes referred to as "Kelly" and/or "mother"), for enforcement of a custody order from the Commonwealth of Virginia. The petitioner contends that an alleged custody order judgment from the State of New Hampshire is void.

On January 16, 2007, Mitrano filed a complaint for enforcement of a Virginia custody order pursuant to Title 28 of the United States Code, Section 1738A along with a request for other relief. The next day on January 17, 2007, Mitrano filed an Emergency Motion and/or

Request and/or Second Verified Application for the Issuance of a Warrant to Take Custody of Child and also on January 17, 2007, Mitrano also filed Plaintiff's Emergency Motion to Determine Whether the Subject New Hampshire Order is Void as a Matter of Law. On January 17, 2007, the Honorable Durke G. Thompson of the Circuit Court for Montgomery County, Maryland denied Mitrano's Verified Application for the Issuance of a Warrant to Take Physical Custody of Child and refused to rule upon Plaintiff's Emergency Motion to Determine Whether the Subject New Hampshire Order is Void as a Matter of Law that was filed on January 17, 2007.

Thereafter, Mitrano filed an interlocutory appeal (No. 2804 before the Court of Special Appeals of Maryland) which was dismissed. Mitrano then filed a Petition for Writ of Certiorari (No. 331 before the Court of Appeals of Maryland) which the Court of Appeals of Maryland denied. On remand to the trial Court, on April 18, 2008, the Honorable Michael D. Mason of the Circuit Court for Montgomery County, Maryland dismissed the action with prejudice, sua sponte, on the basis that the case was barred under the doctrine of claim preclusion. Mitrano then timely filed an appeal of the dismissal of the case, No. 531, before the Court of Special Appeals of Maryland which was affirmed in an opinion written by the Honorable Charles E. Moylan, Jr. dated November 21, 2008. Thereafter, on February 13, 2009, the Court of Appeals of Maryland denied a Petition for Writ of Certiorari (No. 544).

The father has been denied the right to see his son Christopher since January 5, 2001 (except once in February 2008 when his son visited petitioner's brother at Yale-New Haven Hospital) when the respondent Kelly took the child from Fairfax, Virginia for an alleged visitation on Friday, January 5, 2001 and failed to return the child on the following Monday, January 8, 2001.

As difficult as this matter has been since January 5, 2001 when the father last saw his son Christopher (except once in February 2008 when his son visited petitioner's brother at Yale-New Haven Hospital) (note litigation commenced in 2000 and further note that a daughter reached the age of majority on October 4, 2003 and that an older son reached the age of majority on December 27, 2004), the father continues to pursue this matter in part in the hopes of sending a message on behalf of other parents.

Reasons for Granting the Petition

It was a grave injustice for the trial court to dismiss this action and it was another grave injustice for the Court of Special Appeals to affirm the judgment of the trial court. As Mitrano stated in paragraph numbered one of the complaint filed before the trial court, Title 28 United States Code, § 1738A, also know as the Parental Kidnapping Prevention Act (PKPA), provided the trial court with subject-matter jurisdiction. Note that because the legal issue is predicted upon an issue of federal law, any

state court rulings are not dispositive of the outcome before a federal court, see *United States* v. *Bedford*, 519 F.2d 650, 654 n. 3 (3rd Cir. 1975), cert. denied 424 U.S. 917 (1976) ("It is a recognized principle that a federal court is not bound by a state court's interpretation of federal laws or of a state statute under misapprehension of federal law."); *Meade* v. *Meade*, 812 F.2d 1473, 1477 (4th Cir. 1987) ("Faced with inconsistent [custody] decrees, a federal court must determine the relevant state law in the ordinary fashion, and the Virginia [state court] opinion, while entitled to some deference, must be rejected if clearly mistaken."); *In re Cummings*, 297 B.R. 701, 707 (Ill. 2003) ("decisions of state courts are never dispositive on issues of federal law"); *Surrick* v. *Killion*, 449 F.3d 520, 535 (3rd Cir. 2006) ("decisions of the Pennsylvania Supreme Court do not bind this Court with respect to federal law"); *Evans* v. *Thompson*, 518 F.3d 1, 10 (1st Cir. 2008) rehearing denied, rehearing en banc denied, 524 F.3d 1 (1st Cir. 2008) ("There is no impairment of lower federal courts' independent interpretative authority: such courts still have authority to decide whether a state court decision is wrong, and whether the decision is, in addition, unreasonably so."); *Hall* v. *Norfolk Southern Ry. Co.*, 829 F.Supp 1571, 1575 n. 3 ("The Court notes that in considering this question it is not limited to or bound by the law of the forum state."); *United States* v. *Rickus*, 566 F.Supp. 96, 98 n. 3 (Pa. 1983) ("'a federal court is not bound by a state statute under misapprehension of federal law.'"); *Tereance D.*

v. *School Dist. Of Philadelphia*, 370 F.Supp.2d 739, 745 n. 7 (Pa. 2008) ("State court interpretations of federal law are not binding on this court."); and, *Industrial Consultants, Inc.* v. *H. S. Equities, Inc.*, 646 F.2d 746, 749 (2nd Cir. 1981) ("The district court was not bound to adopt the Oklahoma court's interpretation of federal constitutional principles, even as applied to Oklahoma statutes."). Also see 45 Ohio State Law Journal 429, 453 (1984) Remedies for Parental Kidnapping in Federal Court: A Comment Applying the Parental Kidnapping Prevention Act in Support of Judge Edwards by Joan M. Krauskopf stating "The custodian [parent] is forced into the courts of the abductor's state, which have shown an alarming tendency to continue their parochial protection of their own residents even under the PKPA." Clearly, the doctrine of federal pre-emption applies to the subject New Hampshire Lebanon Family Court custody order dated September 27, 2002. Article VI of the United States Constitution clearly provides in part that:

> "(T)he Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Thus, Mitrano contends pursuant to the above-quoted language of the United States Constitution that this Supreme Court should

enforce the terms of 28 U.S.C. § 1738A regardless of what any other state courts may say what said federal law is. Said above-quoted language of the United States Constitution supercedes any state laws and/or rules and/or rulings that conflict with said above-quoted language of thc United States Constitution. Also see *Sola Elec. Co.* v. *Jefferson Elec. Co.*, 317 U.S. 173, 176 (1942) ("It is familiar doctrine that the prohibition of a federal statute may not be set at naught, or it benefits denied, by state statutes or state common law rules."). In *Crater* v. *Galaza*, 508 F.3d 1261, 1266 (9th Cir. 2007), the court further explained:

> ". . . *Marbury* established another fundamental function of the Article III 'judicial power': . . .
>
> "The Court extended this supremacy-maintaining principle to the federal courts' review of state decisions in *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 4 L.Ed. 97 (1816), and *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 . . . the Court had the authority and the responsibility to ensure that state court rulings conformed to the dictates of the Constitution. Once a federal court was charged with reviewing state court judgments, it could not, consistent with its duty to maintain the supremacy of the Constitution, uphold state court rulings that it contended violated that supreme law . . . ."

Arguendo (Mitrano contends that there has not been a final decision on the merits as to whether the New Hampshire order is void; but, even if it was determined that there had been a decision), in the instant case, Mitrano contends that other state courts do not have the final say as to the interpretation of the federal law contained in 28 U.S.C., § 1738A. Mitrano has steadfastly maintained that the subject custody order from the State of New Hampshire is void as a matter of law. Under New Hampshire law, a void judgment can be attacked at any time. Other states are not allowed to bootstrap a void judgment from New Hampshire into any form of valid existence under New Hampshire law. Mitrano contends the law of the State of New Hampshire, not the law of the State of Maryland, controls which state law is applicable in applying the doctrine of issue preclusion. Also note as stated in *Mitrano* v. *Houser*, 240 S.W.3d 854, 861 (Tenn. 2007):

> "Mr. Mitrano argues in his brief that 'the law of the State of New Hampshire, not the law of the State of Tennessee, dictates whether or not the doctrine of issue preclusion (footnote omitted) precludes this action from proceeding.' We agree. This court has frequently stated that 'the full faith and credit clause requires that the common law doctrine of *res judicata* be applied in one state to a judgment rendered in another state

> to the same extent that it applied in the state of its rendition.'" (Citations omitted.)

Also see *Rourke* v. *Amchem*, 384 Md. 329, 863 A.2d 926, 935 (2004) ("[T]he United States Supreme Court has made clear that, in determining the preclusive effect to be given to the judgment of a State court, the claim and issue preclusion rules of the State that rendered the judgment must govern").

Moreover, with all due respect, despite the conclusory statements by the Court of Special Appeals, there have not been any decisions on the merits that have determined that the subject custody dated September 27, 2002 from the State of New Hampshire is <u>not</u> void as a matter of law. The actions brought in the federal courts were not decided on the merits. The actions brought in the State of Vermont and the Commonwealth of Virginia were filed prior to the date of the subject custody order dated September 27, 2002 from the State of New Hampshire. In addition, the action in the State of Vermont is not a final order because it is still subject to review before this Supreme Court. The actions in the Commonwealth of Virginia were not decided on the merits. See *Mitrano* v. *Kelly*, 172 Vt. 643, 785 A.2d 191 (2001) (table decision), cert. denied 534 U.S. 1115 (2002), on remand, 175 Vt. 639, 824 A.2d 609 (2003) (table decision), cert. denied 540 U.S. 825 (2003), on remand and pending in family court in Windsor, Vermont; *Mitrano* v. *Kelly*, (unpublished decision from family court

in Lebanon, New Hampshire), cert. denied 537 U.S. 1161 (2003), rehearing denied 538 U.S. 940 (2003); *Mitrano* v. *Martin*, (unpublished decision from First Circuit), cert. denied 537 U.S. 1160 (2003); *Mitrano* v. *Kelly*, denial by Circuit Court of Fairfax County, Virginia dated January 5, 2001 for emergency relief, appeal dismissed; etc.; *Mitrano* v. *Warshell*, 150 Fed.App. 277 (4th Cir. 2005) (appellant's brief appears at 2004 WL 3489024 and appellant's reply brief appears at 2004 WL 3489022), certiorari denied, 547 U.S. 1098 (2006); *Mitrano* v. *Warshell*, (unpublished decision from First Circuit) certiorari denied, 547 U.S. 1129 (2006); *Mitrano* v. *Kelly*, (unpublished dismissal from New Hampshire Supreme Court), certiorari denied, 549 U.S. 889 (2006); and *Mitrano* v. *Kelly*, (unpublished from Court of Special Appeals dated August 20, 2007, No. 2804), 402 Md. 354, 936 A.2d 851, (Table) certiorari denied (2007). Also note *Thompson* v. *County of Franklin*, 15 F.3d 245, 253 (2nd Cir. 1994), wherein the court stated "dismissals for lack of subject matter jurisdiction are not on the merits and are not accorded res judicata effect". See *St. Pierre* v. *Dyer*, 208 F.3d 394, 400 (2nd Cir. 2000) ("a dismissal for lack of subject matter jurisdiction is not an adjudication of the merits and hence has no res judicata effect"); *Leaf* v. *Supreme Court of State of Wis*, 979 F.2d 589, 595 (7th Cir. 1992) cert. denied 508 U.S. 941 (1993) ("dismissal for lack of subject-matter jurisdiction under Federal Rules of Civil Procedure 12(b)(1) and 41(b) is not a decision on the merits and, therefore, constitutes

dismissal without prejudice"); and, *Goldsmith* v. *Mayor and City Council of Baltimore*, 987 F.2d 1064, 1069 (4th Cir. 1993) ("In that case we held that the district court was without jurisdiction to consider Miss Goldsmith's claims because those claims were so insubstantial as to be frivolous . . . . As a jurisdictional dismissal, the judgment in *Goldsmith I* is not a judgment on the merits for purposes of res judicata . . . .")

The law in the State of New Hampshire is that a void judgment can be attacked at any time. In *Kittredge* v. *Emerson*, 15 N.H. 227, 262, 263 (1844), the court stated:

> "'. . . But if it act without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void; and form no bar to a recovery sought, even prior to a reversal, in opposition to them. They constitute no justification; and all persons concerned in exceeding such judgments or sentences, are considered in law as trespassers.' 1 Peters's R. 340, Elliot vs. Piersol.
>
> ". . . If there is a total want of jurisdiction, the proceedings are void and a mere nullity, and confer no right, and afford no justification, and may be rejected when collaterally drawn in question.' 2 Peters's R. 163, Thompson vs. Tolmie."

Also see *Coleman Bros. Corp.* v. *City of Franklin*, 58 F.Supp. 551, 554 (N.H. 1945) ("The want of jurisdiction in any tribunal renders its proceedings void and when the want of jurisdiction is shown by the record and proceedings themselves, it may be taken advantage of at any time."); *Patterson* v. *Patterson*, 306 F.3d 1156, 1159 (1st Cir. 2002) ("In New Hampshire, '[t]he probate court is not a court of general jurisdiction'") and *State* v. *Moquin*, 105 N.H. 9, 13, 191 A.2d 541, 544-545 (1963) where the dissent stated:

> "Unlike the district courts of Massachusetts which are courts of 'general and superior jurisdiction' . . . the municipal courts of New Hampshire have limited jurisdiction . . . ."

Moreover, in the instant case, also note that it was premature for the lower courts in the State of Maryland to rule on the affirmative defense of issue preclusion. See *Poteet* v. *Sauter*, 136 Md.App. 383, 766 A.2d 150, 164 (2001) ("Res judicata is an affirmative defense that bars the relitigation of matters previously litigated") and *Exxon Mobil Corp.* v. *Saudi Basic Industries*, 544 U.S. 280, 293 (2005) ("Preclusion, of course, is not a jurisdictional matter. See Fed. Rule Civ. Proc. 8(c) (listing res judicata as an affirmative defense)"). In *Usrey* v. *Lewis*, 553 S.W.2d 612, 614 (Tenn. 1977), the court stated:

> "It appears, therefore, that res judicata is an *affirmative* defense which must be *plead* specially. It would therefore appear that the proper method to present the defense of res judicata is by a *pleading* (answer), and not by a motion . . ." (Italicized text in original quotation.)

In *Gregory* v. *Gregory*, 803 S.W.2d 242, 243 (Tenn. Ct. App. 1990), the court stated:

> "In order to succeed on a plea of *res judicata*, or estoppel by judgment, the party raising the defenses must plead it, Tenn.R.Civ.P. 8.03, and must carry the burden of proving it . . . ." (Citation omitted.)

Note Kelly did not plead the affirmative defense of issue preclusion and the trial court committed error by sua sponte dismissing this action predicated on the affirmative defense of issue preclusion. See *Uffner* v. *La Reunion Francaise, S.A.*, 244 F.3d 38, 41 (1st Cir. 2001) (when an objection to personal jurisdiction was not made before the district court, the court should not have raised the issue *sua sponte* because the court has no independent reason to raise the issue when the objection had been waived).

Back in 1873, in *Thompson* v. *Whitman*, 85 U.S. 457, 469 (1873), this Supreme Court stated in a case filed in federal court in the State of New York challenging the subject-matter jurisdiction of justices of the peace in the State of New Jersey that:

> "On the whole, we think it clear that the jurisdiction of the court by which a judgment is rendered in any State may be questioned in a collateral proceeding in another State, notwithstanding the provision of the fourth article of the Constitution and the law of 1790, and notwithstanding the averments contained in the record of the judgment itself."

Thus, a reading of *Thompson* v. *Whitman*, clearly supports Mitrano's position that a void judgment from the state courts of the State of New Hampshire may be attacked. The state court in the State of New Hampshire was a court of limited and inferior authority. See *State* v. *Flynn*, 110 N.H. 451, 453, 272 A.2d 591, 593 (1970) ("District courts, like municipal courts, are courts of special and limited jurisdiction which are not vested with as broad inherent powers as courts of superior and general jurisdiction."); and, *Kiluk* v. *Potter*, 133 N.H. 67, 68-70, 572 A.2d 1157, 1158 (1990).

In *Galpin* v. *Page*, 85 U.S. 350, 365-366 (1873) which was also decided 1873, the same

year as *Thompson* v. *Whitman*, this Supreme Court further explained that there is a different standard applied when a court of general jurisdiction makes a determination with respect to its jurisdiction as opposed to a court of limited and inferior authority such the subject state court in the State of New Hampshire and stated:

> ". . . The rule is different with respect to courts of special and limited authority; as to them there is no presumption of law in favor of their jurisdiction; that must affirmatively appear by sufficient evidence or proper averment in the record, or their judgments will be deemed void on their face."

Also see *Kalb* v. *Feuerstein*, 308 U.S. 433, 439 (1940) ("The States cannot, in the exercise of control over local laws and practice, vest State courts with power to violate the supreme law of the land." (Footnote omitted.)). In the footnote numbered 12 from the case *Kalb* v. *Feuerstein*, 308 U.S. 433 (1940), the Supreme Court explained that the issue of whether a state court decision is void ab initio arises from cases unrelated to bankruptcy. Also see *Moore* v. *Dempsey*, 261 U.S. 86 (1923); *Johnson* v. *Zerbst*, 304 U.S. 458, 468 (1938) ("If this requirement of the Sixth Amendment is not complied with, the court no longer has jurisdiction to proceed."); and, *Frank* v. *Mangum*, 237 U.S. 309, 327 (1915) wherein the Supreme Court stated:

> ". . .[A]bsolutely void for want of jurisdiction in the court that pronounced it, either because such jurisdiction was absent at the beginning, or because it was lost in the course of the proceedings . . . ."

In *Durfee* v. *Duke*, 375 U.S. 106, 110, 114 (1963), this Supreme Court discussed the "rule of finality of jurisdictional determinations" with respect to courts of general jurisdiction (as opposed to courts of special and limited jurisdiction):

> ". . . [I]n the leading case of *Thompson* v. *Whitman*, 18 Wall. 457 . . . 'we think it clear that the jurisdiction of the court by which a judgment is rendered in any State may be questioned in a collateral proceeding in another State, notwithstanding the provision of the fourth article of the Constitution and the law of 1790, and notwithstanding the averments contained in the record of the judgment . . .
>
> . . .
>
> "To be sure, the general rule of finality of jurisdictional determinations is not without exceptions. Doctrines of federal pre-emption or sovereign immunity may in some contexts be controlling. *Kalb* v. *Feuerstein*, 308

> U.S. 433 . . . *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506 . . . ."

Also note that in *Sherrer* v. *Sherrer*, 334 U.S. 343, 357-358 (1948), Justice Frankfurter of this Supreme Court stated in an dissenting opinion that:

> "It would certainly have been easier if from the beginning the Full Faith and Credit Clause had been construed to mean that the assumption of jurisdiction by the courts of a State would be conclusive, so that every other State would have to respect it. But such certainly has not been the law since 1873. *Thompson v. Whitman*, 18 Wall. 457, 21 L.Ed. 897 . . . ."

Also see *State* v. *Bushoug*, 109 N.E.2d 692, 694, 695 (Ohio 1951) where the court stated:

> "No presumption prevails in favor of the jurisdiction of a court or tribunal of inferior, limited or special jurisdiction and it is necessary, in order to sustain the proceedings of such a court, that the record show affirmatively that the court had jurisdiction. 21 C.J.S., Courts, § 105, p. 159; 14 American Jurisprudence, 251, Courts, Section 8.
>
> . . .

> "The judgments of courts of special and limited jurisdiction may be examined thoroughly for the facts and evidence necessary to sustain them, as the decisions do not furnish evidence in themselves to show jurisdiction and its lawful exercise and every requisite for either jurisdiction or its lawful exercise must appear upon the face of the proceedings or they are a nullity. 21 C.J.S., Courts, § 2, p. 19."

Also see *Grignon's Lessee* v. *Astor*, 43 U.S. 319, 341 (1844) ("That applies to 'courts of special and limited jurisdiction, which are created on such principles that their judgments, taken alone, are entirely disregarded, and the proceedings must show their jurisdiction"); *McCormick* v. *Sullivant*, 23 U.S. 192, 199-200 (1825), ("inferior Courts, in the technical sense of those words, whose judgments, taken alone, are to be disregarded"); *Smith* v. *Knowlton*, 11 N.H. 191, 198 (1840) ("The court having no jurisdiction of the cause, the whole proceedings are void"); and, *Gorrill* v. *Whittier*, 3 N.H. 265, 269 (1825) ("So where a court of limited jurisdiction takes cognizance of a cause, not within its jurisdiction, the whole proceeding is *coram non judice* and void.")

Thus, this Supreme Court has ruled that "**courts of a special and limited jurisdiction**" "**must show their jurisdiction**" or "**their judgments, taken alone, are entirely**

disregarded". In other words, if a court (such as the instant New Hampshire state court) is of special and limited jurisdiction, its judgment is a nullity if the said court does not have jurisdiction. Mitrano contends that it is clear that the subject state court orders and/or decisions from the state court in the State of New Hampshire are void. Also see *Kempe's Lessee* v. *Kennedy*, 9 U.S. 173, 185 (1809); *McCormick* v. *Sullivant*, 23 U.S. 192, 199-200 (1825) ("if the decree had been considered as a nullity, on the ground that jurisdiction was not stated in the proceedings"). In other words, because the subject New Hampshire state court is of special and limited jurisdiction, its judgment is a nullity if said court does not have jurisdiction. See *Randall* v. *Brigham*, 74 U.S. 523, 535-536 (1868) ("In reference to judges of limited and inferior authority, it has been held that they are protected only when they act within their jurisdiction"); *Bradley* v. *Fisher*, 80 U.S. 335, 351 (1871); *Forrester* v. *White*, 484 U.S 219, 228 (1988). Also see *Plant Equip.* v. *Nationwide Control Serv.*, 798 N.E.2d 1202, 1206 (Ohio 2003) ("A judgment can be void not only for lack jurisdiction, but also where the court acts in a manner contrary to due process . . . A void judgment is a nullity. It may be collaterally attacked at any time"); *Rankin* v. *Howard*, 633 F.2d 844, 849 (9th Cir. 1980) certiorari denied *Zellar* v. *Rankin*, 451 U.S. 939 (1981); and, *Ableman* v. *Booth*, 62 U.S. 506, 524 (1858). Also note *Spoors* v. *Coen*, 44 Ohio St. 497 (1886) and Rosenberg, *Stump v. Sparkman*: The Doctrine of Judicial Impunity,

64 Va.L.Rev. 833, 843 (1978) ("the very point in creating courts of limited jurisdiction is to assure that their authority is confined within more or less carefully delineated borders").

The orders from the State of New Hampshire violated 28 U.S.C. § 1738A.

By way of background, the ex parte orders from the State of New Hampshire violated 28 U.S.C. § 1738A(e). Note that in *Ex parte D. B.*, 975 So.2d 940, 954-955 (Ala. 2007), the court stated in part that:

> "Even more important than whether the notice requirements of Nebraska were met, however, is **whether the notice requirements of the PKPA were met**. **To be enforceable** in Alabama, the Nebraska custody determination ultimately **would have to comply with § 1738A(e) of the PKPA**, which provides: 'Before a child custody or visitation determination is made, reasonable notice and opportunity to be heard shall be given to ... any person who has physical custody of a child.'" (Footnote omitted.) (Bold emphasis added.)

Because 28 U.S.C., § 1738A(e) was violated when the State of New Hampshire issued the ex parte orders in the instant case, said ex parte orders are and remain unenforceable.

It is also important to note that the State of New Hampshire clearly lost subject-matter jurisdiction when Mitrano left the State of New Hampshire at the end of the day of December 20, 2000. The State of New Hampshire did not regain subject-matter jurisdiction at a later date while the matter proceeded unlawfully in the courts of the State of New Hampshire. In the case of *In re Marriage of Sareen*, 62 Cal.Rptr.3d 687, 690-691, 693 (2007), cert. denied 128 S.Ct. 1670 (2008), the court stated in part:

> ". . . [A]bsent an order from the Delhi court declining jurisdiction in favor of California, this Court does not have jurisdiction . . .
>
> . . .
>
> "Although there is some conflict in the parties' version of events in this case, the relevant jurisdiction facts are largely undisputed. 'We are not bound by the [trial] court's findings regarding subject matter jurisdiction, but rather 'independently reweigh the jurisdiction facts.' [Citation] '[S]ubject matter jurisdiction either exists or does not exist at the time the action is commenced' [citation] and cannot be conferred by stipulation, consent, waiver, or estoppel [Citations].'
>
> . . .

> "Although we have not found any California case holding on point, cases in other states have concluded **time spent in a forum after the filing of a child custody petition may not be counted towards the time necessary for home state jurisdiction** . . . ." (Footnote omitted.) (Bold emphasis added.)

Accordingly, because Virginia Kelly was living in the State of Vermont when she filed the action in the State of New Hampshire and because the State of New Hampshire lost subject-matter jurisdiction on December 20, 2000 when Mitrano left the State of New Hampshire, nothing thereafter restored subject-matter jurisdiction in the State of New Hampshire. Again, Mitrano contends that any judgments or orders entered by the state courts in New Hampshire are void because of a lack of subject-matter jurisdiction. The state courts of New Hampshire clearly violated 28 U.S.C. § 1738A(e) by issuing ex parte orders taking away the children from Mitrano. The doctrine of federal pre-emption, by and through 28 U.S.C. § 1738A, controlled any state proceedings. Also note that because Kelly had moved out of the State of New Hampshire into the State of Vermont on or prior to October 1, 2000, the children were living in Vermont while visiting Kelly on certain weekends and also in New Hampshire while living with Mitrano during the week and on the remaining weekends. This fact

is important because when Kelly commenced custody litigation in New Hampshire on October 16, 2000, under 28 U.S.C. § 1738A(b)(4), the children did not have a "home State". Accordingly, under 28 U.S.C. § 1738A(c)(2)(ii), New Hampshire was divested of jurisdiction when Mitrano, as the last contestant remaining in the State of New Hampshire, moved out of the State of New Hampshire. In other words, when Mitrano left the State of New Hampshire on December 20, 2000, the state courts in New Hampshire no longer has subject-matter jurisdiction pursuant to 28 U.S.C. § 1738A. Because the state court in the State of New Hampshire that issued the orders which Mitrano contends are void (because of lack of subject-matter jurisdiction) is a court of limited and inferior jurisdiction, said orders can be attacked in this action. Also see *In re Gruntz*, 202 F.3d 1074, 1087 (9th Cir. 1999).

As this Court is well aware, lack of jurisdiction over the subject-matter cannot be waived. Lack of jurisdiction over the subject-matter cannot even be stipulated to by willing adverse parties to an action. Accordingly, Mitrano contends friendly states such as the State of Maryland, State of Vermont and/or the Commonwealth of Virginia cannot dictate and/or rule and/or suggest that the subject court in the State of New Hampshire has subject-matter jurisdiction when, said New Hampshire court does not have subject-matter jurisdiction.

Another important point is that the State of New Hampshire was not a "home State" of

the children "on the date of the commencement of the proceeding". See 28 U.S.C. § 1738A(c)(2)(A)(i). Mitrano left the State of New Hampshire by the end of day of December 20, 2000. There was no contestant (a "contestant" is defined as "a person, including a parent or grandparent, who claims a right to custody or visitation of a child") living in the State of New Hampshire at the end of day of December 20, 2000. Mitrano's daughter, Christina, had been unlawfully living with her mother in the State of Vermont. Mitrano's sons were living in the Commonwealth of Virginia with Mitrano until Kelly with the assistance of William D. Philips unlawfully took said boys from the Commonwealth of Virginia to the State of Vermont under Kelly's right of visitation and failed to return said boys according to the custody Order of the Circuit Court of Fairfax County, Virginia. Accordingly, after December 20, 2000, the State of New Hampshire no longer could even be considered a "home State" to pursuant 28 U.S.C. § 1738A(c)(2)(A)(ii) because no one was left in the State of New Hampshire.

Thus, any orders issued by the State of New Hampshire after December 20, 2000 are clearly void for lack of subject-matter jurisdiction. Title 28 U.S.C. § 1738A(c)(2)(A)(ii) requires that "a contestant continues to live in such State".

There is no dispute by and through the custody order of the Circuit Court of Fairfax County, Virginia, that in 1992 the Commonwealth of Virginia "made a child custody or visitation determination" consistent

"with the provisions of" 28 U.S.C. § 1738A. Section 20-108 of the Code of Virginia provides the Commonwealth of Virginia shall continue to have jurisdiction over the custody order from Fairfax County, Virginia. In *Eichelberger* v. *Eichelberger*, 2 Va.App. 409, 412, 345 S.E.2d 10, 12 (1986), the court ruled:

> "Once a court has ruled on matters relating to the custody and care of minor children, and visitation rights of the noncustodial parent, the court retains jurisdiction throughout the minority status of the child involved. Andrews v. Geyer, 200 Va. 107, 104 S.E.2d 747, 751 (1958) . . . ."

Mitrano currently is a resident of the Commonwealth of Virginia. The children's paternal grandparents, who are contestants, have been residents of the Commonwealth of Virginia since 1972. Commonwealth of Virginia has continuing jurisdiction pursuant to 28 U.S.C. §§ 1738A(c)(2)(E) and 1738A(d). 28 U.S.C. § 1738A(d) states that:

> "(d) The jurisdiction of a court of a State which has made a child custody or visitation determination consistently with the provisions of this section continues as long as the requirement of subsection (c)(1) of this section continues to be met and such State remains the

> residence of the child or of any contestant."

Indeed, on January 4, 2001, the Juvenile and Domestic Relations District Court of Fairfax County in the Commonwealth of Virginia in Case Numbered JJ334381-01-01 and Case Numbered JJ334382-01-01 did exercise subject-matter jurisdiction on an ex parte basis at the request of Kelly and ruled on January 4, 2001 that : "Neither party to remove the children from the Commonwealth of Virginia".

Note that in *Thompson* v. *Thompson*, 484 U.S. 174 (1988) this Supreme Court ruled that 28 U.S.C. § 1738A is only a full faith and credit statute and does not create a federal right of action. Also see *Meade* v. *Meade*, 650 F.Supp. 205, 210 (N.C. 1986), affirmed 812 F.2d 1473 (4th Cir. 1987), which was decided prior to *Thompson* v. *Thompson, supra*, wherein the court stated in part that:

> ". . . Thus North Carolina is under a federal duty to enforce the decree according to its terms and acted improperly in modifying Virginia's initial decree."

Mitrano therefore contends that the Commonwealth of Virginia had and has continuing jurisdiction based upon Mitrano's residence in the Commonwealth of Virginia and/or the paternal grandparents' residence in the Commonwealth of Virginia. See the discussions about the Uniform Child-Custody

Jurisdiction and Enforcement Act (UCCJEA) contained in 32 Family Law Quarterly 267, 342 (1998), wherein it is stated with reference to said Uniform Child-Custody Jurisdiction and Enforcement Act "that a remaining grandparent . . . should not suffice to confer exclusive, continuing jurisdiction". Contrary to said UCCJEA, 28 U.S.C. § 1738A clearly provides that a remaining grandparent does in fact suffice to confer exclusive, continuing jurisdiction.

Another case discussing this issue is *Clarke* v. *Clarke*, 126 N.H. 753, 755, 758, 496 A.2d 361, 363, 365 (1985), wherein the court stated:

> "Critical to our analysis of the issue of jurisdiction presented here is the recognition that this case involves modification of an existing custody order and not formulation of an initial decree. (Citations omitted.) . . .
>
> "Unless there has been a final order by an out-of-state court declining jurisdiction to modify its custody decree, the courts of New Hampshire will not assume jurisdiction to modify such a decree."

Note that on January 4, 2001, the Commonwealth of Virginia was still excising jurisdiction and has never issue an order declining jurisdiction pursuant to 28 U.S.C. §

1738A. See Commonwealth of Virginia Case Numbered JJ334381-01-01 and Case Numbered JJ334382-01-01 stating that: "Neither party to remove the children from the Commonwealth of Virginia". Although the Commonwealth of Virginia later stated in dicta to follow an New Hampshire order; Mitrano contends said dicta was error.

Moreover, as previously stated, the State of New Hampshire was not a "home State" on the dates that Kelly filed the petitions to modify the custody order from the Commonwealth of Virginia because the children had been living in the State of Vermont part of the time with Kelly prior to the filing of the petitions. See *Neger* v. *Neger*, 93 N.J. 15, 32-33, 459 A.2d 628, 637-638 (1983), wherein the court stated:

> "As noted previously, the appellant and appellee had arranged for alternating physical custody of Carly . . . This record does not satisfy the statutory six-consecutive-month requirement. Carly had not lived with her father in California for six consecutive months 'within six months before commencement of the proceeding' involving custody in the California court . . . A contention that Carly's absence from New Jersey was temporary and therefore should not be counted as part of a six-month period assumes that residing with her father was only a visit.

> **However, the arrangement here was not truly characteristic of a visit, but consisted of fixed substantial periods of time in a regular alternating manner unrelated to holidays or vacations. It is possible, of course, that there may be no home state.** *See, e.g., In re the Marriage of Hubbard*, 315 N.W.2d 75 (Iowa 1982) (after Iowa divorce in 1976 in which mother was awarded custody of three children, mother and children moved so frequently before custody modification instituted in Iowa in 1979, that there was no 'home state')." (Bold emphasis added.)

Also see *Johnson* v. *Johnson*, 26 Va. App. 135, 149, 493 S.E.2d 668, 675 (1997), wherein the court stated:

> "In the instant case, during the time immediately preceding both the divorce decree and the consent decree of December 1993, the child spent short periods alternatively with each parent, resulting in an equal division of her time between Virginia and New York. **At that time, the child had no single home state under the UCCJA definition** . . . ." (Bold emphasis added.)

In *St. Andrie* v. *St. Andrie*, 473 So.2d 140, 144 (La. 1985), the court also found that the child had no home state when the child lived in two different states pursuant to the agreement of the parents, the court explained the situation and stated:

> "Analyzing the situation before the court under the 'home state' standard, during the six-month period prior to the institution of the custody proceeding . . . the child was in fact shuttled back and forth between Georgia and Louisiana every few months. Therefore, **it is clear that the child has no 'home state'**." (Bold emphasis added.)

Also see 45 Hastings L.J. 1329, 1344 (July 1994) wherein it is noted that "A child in a joint custody situation might have two established homes."

Also see *State Ex Rel. Conforti* v. *Wilson*, 203 W.Va. 21, 25, 506 S.E.2d 58, 62 (1998) ("Naturally, as a federal jurisdictional statute, the PKPA preempts the UCCJA by virtue of the Supremacy Clause."); *Shute* v. *Shute*, 158 Vt. 242, 247, 607 A.2d 890, 893 (1992) (PKPA preempts the UCCJA and/or the state statutes); *Matter of Adoption of Child by T.W.C.*, 636 A.2d 1083, 1088 (N.J. 1994) ("The jurisdictional requirements of the PKPA, of course, preempt those of the UCCJA if the acts are in conflict").

Because the State of New Hampshire was not a "home State" on the dates the petitions were filed by the mother, the interpretation of the following language contained in 28 U.S.C. § 1738A(c)(2)(A) is critical:

> "(A) such State (i) is the home State of the child on the date of the commencement of the proceeding, **or** (ii) had been the child's home State within six months before the date of the commencement of the proceeding and the child is absent from such State because of his removal or retention by a contestant or for other reasons, **and a contestant continues to live in such State**;" (Bold emphasis added.)

Note that in interpreting the language "**and a contestant continues to live in such State**", this Court must consider the statute as a whole. The language is different than the words "on the date of the commencement of the proceeding" that are in the beginning of above-quoted language of 28 U.S.C. § 1738A(c)(2)(A). Also note the difference in words contained in 28 U.S.C. § 1738A(d) that "such State remains the residence of the child or of any contestant". Thus in interpreting the language "**and a contestant continues to live in such State**", this Court should find that the plain language of said words means that the State of New Hampshire no longer had jurisdiction when all

the contestants stopped living in the State of New Hampshire. In the *Matter of Guardianship of Walling*, 727 P.2d 586, 590 (Okl. 1986), the court stated:

> "Paragraph 1.a also does not apply because the children were not in the state at the time the commencement of the proceeding. Furthermore, paragraph 1.b is not applicable **because of the requirement of having a 'person acting as parent' continued to live in the state** . . ." (Bold emphasis added.)

Note that in discussions about the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA) contained in 32 Family Law Quarterly 267, 343 (1998), it is stated with reference to said Uniform Child-Custody Jurisdiction and Enforcement Act that:

> "If State A had jurisdiction under this Section [UCCJEA] at the time a modification proceeding was commenced there, it would not be lost by all parties moving out of the state prior to the conclusion of proceeding . . . ."

In comparison, the language of 28 U.S.C. § 1738A provides that jurisdiction is divested by all parties moving out of the state prior to the conclusion of the proceedings under 28 U.S.C. §

1738A(c)(2)(A)(ii). Also note *Kalb* v. *Feuerstein*, 308 U.S. 433, 438-439 (1940) (concept of a state court being divested of jurisdiction). Accordingly, any orders issued by the State of New Hampshire after December 20, 2000 would be void for lack of subject-matter jurisdiction pursuant to 28 U.S.C. § 1738A. *Also see Badwell* v. *Brooks*, 141 N.H. 508, 512, 686 A.2d 1179, 1182 (1996) ("court's jurisdiction to award custody is purely statutory"). It is important to note that Kelly has wrongfully failed to return the subject child to Peter Paul Mitrano after her scheduled visitation ended on Monday, January 8, 2001. As the court stated in *Johnson* v. *Johnson*, 26 Va. App. 135, 149, 493 S.E.2d 668, 674 (1997):

> ". . . Here mother violated a custody agreement by wrongfully retaining her child after her period of physical custody concluded. In both cases, **the violating parent gained a 'tactical advantage by his conduct**.'" (Citation omitted.) (Bold emphasis added.)

Note in *Davis* v. *Gill*, 2007 WY 17, 150 P.3d 1181, 1185 (2007), the court stated in essence that it does not matter if two States have concurrent jurisdiction[1] (the only issue in

---

[1] Note that the word "pending" is not defined in 28 U. S.C., § 1738A. See *Matter of B.B.R.*, 566 A.2d 1032, 1040 n.25 (D.C. 1989) wherein the court stated:

the instant case is if the Commonwealth of Virginia had retained jurisdiction pursuant to 28 U.S.C., § 1738A):

> ". . . Therefore, if there is no error in the district court's determination that Guam has jurisdiction, the question of whether Wyoming has concurrent jurisdiction is moot because a Wyoming court cannot modify a Guam decree while Guam retains jurisdiction."

Do the actions and inactions of the State of New Hampshire related to this matter justify a revolution?

Note that on April 19, 1775, over 234 years ago, our forefathers began a revolution against the King of Great Britain in order to

---

"25. Subsection (g) requires the court of a second state to decline jurisdiction when a child custody proceeding is 'pend[ing]' in the courts of another state. The statute does not define the word 'pend[ing].' We turn to the law of the state where the initial action is allegedly 'pend[ing]' to establish the definition . . . ." (Citation omitted.)

protect the rights and liberties of the present citizens of the United States of America. With all due respect to this Supreme Court of the United States, have we now come full circle wherein the revolution fought so bravely by our forefathers was for naught in that we are now exposed to the tyranny that our forefathers gave up their lives to stop? Petitioner, Peter Paul Mitrano, respectfully and humbly requests that this Supreme Court of the United States rule whether the actions and inactions of the State of New Hampshire justify another revolution. See *In re Anastaplo*, 366 U.S. 82, 112 (1961) ("the men who founded this country and wrote our Bill of Rights were strangers neither to a belief in the 'right of revolution' nor to the urgency of the need to be free from the control of government") (dissent); *American Communications Ass'n, C.I.O.* v. *Douds*, 339 U.S. 382, 439 (1950) ("we cannot ignore the fact that our own Government originated in revolution and is legitimate only if overthrow by force may sometimes be justified") (dissent).

In the instant action, the State of New Hampshire has taken in essence taken away petitioner's children. Petitioner Mitrano contends that he has been subjected to the tyranny of the State of New Hampshire for too long. Enough is enough. See *In re Ford Motor Co. Erisa Litigation*, 590 F.Supp.2d 888, 911 (Mich. 2008) ("'what was the cause of the American Revolution' . . . 'one damned thing after another.'"). It is time for a meaningful change. Whether by design or otherwise, Petitioner Mitrano has been denied justice and

due process. Note the words in the dissent of *Stump* v. *Sparkman*, 435 U.S. 349, 367 (1978) "A judge is not free, like a loose cannon, to inflict indiscriminate damage whenever he announces that he is acting in his judicial capacity."

Conclusion

For these reasons, a writ of certiorari should issue to review the judgments of the Court of Special Appeals of the State of Maryland.

Respectfully submitted,

Peter Paul Mitrano
Pro se[1]
4912 Oakcrest Drive
Fairfax, Virginia 22030
Petitioner

Dated: May 14, 2009.

---

1. The petitioner, Peter Paul Mitrano, is a member of the Bar of this Court.